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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**  
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11 Edward Harold Schad, Jr. and  
12 Robert Glen Jones, Jr.,

13 Plaintiffs,

14 vs.

15 Janice K. Brewer, et al.,

16 Defendants.  
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No. CV-13-01962-PHX-ROS

DEATH PENALTY CASE

**ORDER**

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19 Plaintiff Edward Schad, Jr., an Arizona prisoner under sentence of death, is scheduled  
20 to be executed at 10:00 a.m. on Wednesday, October 9, 2013. He has filed a civil rights  
21 complaint under 28 U.S.C. § 1983 alleging denial of access to a full and fair clemency  
22 process, in violation of his rights under the Eighth and Fourteenth Amendments. He sought  
23 a temporary restraining order preventing the Arizona Board of Executive Clemency (“the  
24 Board”) from holding a commutation hearing and enjoining his execution pending  
25 availability of a full and fair clemency process. (Doc. 1 at 3.) Plaintiff Robert Glen Jones,  
26 Jr., intervened and joined Schad in the motion for injunctive relief. Jones is scheduled to be  
27 executed at 10:00 a.m. on Wednesday, October 23, 2013. On October 1, 2013, the Court  
28 issued a short order that denied the request for a temporary restraining order and stated a

1 longer order would issue. This is that longer order.

## 2 **BACKGROUND**

3 In 1985, a jury convicted Schad of first-degree murder for the 1978 strangling of 74-  
4 year-old Lorimer Grove. The trial court sentenced him to death. Details of the crime are set  
5 forth in *State v. Schad*, 788 P.2d 1162 (1989), and *State v. Schad*, 633 P.2d 366 (1981).  
6 Following unsuccessful state post-conviction-relief proceedings, Schad filed a petition for  
7 a writ of habeas corpus. This Court denied relief in September 2006, and the Court of  
8 Appeals for the Ninth Circuit ultimately affirmed. *Schad v. Ryan*, 671 F.3d 708 (9th Cir.  
9 2011) (per curiam).

10 After denial of certiorari, the Arizona Supreme Court issued a warrant setting Schad's  
11 execution for March 6, 2013. The Board then scheduled a reprieve/commutation hearing for  
12 February 27, 2013. Schad asked to attend the hearing and submitted materials in support of  
13 his request for commutation. (Doc. 1, Ex. C.) On February 26, 2013, instead of issuing its  
14 mandate, the Ninth Circuit granted Schad's request for a remand to this Court for further  
15 habeas corpus proceedings. *Schad v. Ryan*, No. 07-99005, 2013 WL 791610, \*3 (9th Cir.  
16 Feb. 26, 2013). The Board thereafter cancelled Schad's hearing, and the warrant of  
17 execution expired.

18 In June 2013, the United States Supreme Court vacated the Ninth Circuit's remand  
19 order. *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam). Subsequently, the Arizona  
20 Supreme Court issued a new warrant setting Schad's execution for October 9, 2013, and the  
21 Board rescheduled Schad's commutation hearing to October 2, 2013. (Doc. 1, Ex. D.)

22 On September 23, 2013, Schad's federal habeas counsel wrote to each of the four  
23 current members of the Board—Brian Livingston, John “Jack” LaSota, Ellen Kirschbaum,  
24 and Donna Harris—and asked that they recuse themselves from the October 2  
25 reprieve/commutation hearing. The letter stated that a witness had indicated to Schad's  
26 counsel that Livingston and Kirschbaum, “and possibly others, engaged in an informal  
27 conversation wherein each specifically opined that he or she would never recommend  
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1 clemency for Mr. Schad and expressed concern about what the Governor might think of such  
2 a recommendation.” (Doc. 1, Ex. A.) The letter “alleged that this conversation took place  
3 shortly after the previous hearing for Mr. Schad was cancelled either in late February or early  
4 March, 2013.” (*Id.*) The letter further stated that because Harris had only recently been  
5 appointed to the Board, she “cannot comply with the training requirements necessary to sit  
6 as a voting member” at Plaintiff’s impending hearing. (*Id.*) Finally, the letter alleged that  
7 the Governor’s office “has in the past sent letters addressed to Board Members expressing  
8 displeasure with certain board members[’] votes in favor of clemency” and that certain  
9 members “have been summoned to meetings with members of the Governor’s staff to express  
10 displeasure” with their votes. (*Id.*) Schad’s counsel requested that each Board member  
11 respond in writing by close of business, Wednesday, September 25, 2013.

12 On September 26, 2013, Schad initiated this action by filing a civil rights complaint  
13 under 28 U.S.C. § 1983. In his three-count complaint, Schad sues the following Defendants:  
14 Arizona Governor Janice K. Brewer; Scott Smith, Chief of Staff to Governor Brewer; Brian  
15 Livingston, Chairman and Executive Director of the Arizona Board of Executive Clemency;  
16 and John LaSota, Ellen Kirschbaum, and Donna Harris, members of the Board. In Count  
17 One, Schad alleges Defendants have a created a clemency process that is arbitrary and  
18 capricious, in violation of the Eighth and Fourteenth Amendments. In Count Two, Schad  
19 alleges Defendants’ failure to comply with Arizona’s open meetings law violated his rights  
20 under the Eighth and Fourteenth Amendments. In Count III, Schad alleges Defendants  
21 conspired to deprive “high-profile inmates” access to executive clemency, in violation of the  
22 equal protection clause of the Fourteenth Amendment and, for death row inmates, the Eighth  
23 Amendment. In the Prayer for Relief, Schad seeks a declaratory judgment and temporary,  
24 preliminary, and permanent injunctive relief.

25 Schad attached numerous documents to his complaint, including written declarations  
26 from five former Board members. In opposing the motion for temporary restraining order,  
27 Defendants submitted numerous declarations from past and current Board members. Those  
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1 submissions are summarized as follows.

2 Duane Belcher served on the Board for twenty years and was its Chairman and  
3 Executive Directive until replaced in April 2012 after his application for reappointment was  
4 denied. In his declaration, Belcher describes a meeting in early 2012 with two members of  
5 the Governor's staff, including Defendant Smith, during which he was questioned about the  
6 board's vote to recommend clemency in two "high-profile" cases—those of William  
7 Macumber and Robert Flibotte, whose clemency applications were ultimately denied by  
8 Governor Brewer. (Doc. 1, Ex. E.) "It was [his] opinion that the Governor's office wanted  
9 Board Members who would vote the wishes of her office, rather than vote their conscience,  
10 based on the facts and circumstances of each case." (*Id.*)

11 Ellen Stenson served on the Board for five years until she too was replaced in April  
12 2012 after her application for reappointment was denied. According to Stenson's  
13 declaration, during her 2012 interview for reappointment, Defendant Smith asked whether  
14 she stood by the Board's 2009 unanimous vote to recommend clemency for Macumber.<sup>1</sup>  
15 (Doc. 1, Ex. F.) She answered affirmatively and believes her 2009 vote "in combination with  
16 my interview response that I did not regret my 2009 vote and my indication that I would  
17 likely vote the same way, if given the chance, influenced the Governor's decision to oust me  
18 from the Board." (*Id.*)

19 Marilyn Wilkens served on the Board for approximately two years and was the third  
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23 <sup>1</sup> Stenson states in her declaration that in 2009 Macumber had been incarcerated for  
24 murder for over thirty years and presented to the Board "substantial" evidence of innocence.  
25 (Doc. 1, Ex. F.) She claims that Governor Brewer's rejection of his clemency application  
26 "made national news" and "generated significant criticism." (*Id.*) Stenson further states that  
27 she was unable to attend a 2012 Board meeting to consider a new application from  
28 Macumber and that the 2012 vote was split 2-2 (Duane Belcher and Jack LaSota in favor, and  
Ellen Kirschbaum and Marilyn Wilkens against). (*Id.*) Therefore, Macumber's 2012  
application did not advance to the Governor. (*Id.*)

1 member replaced in April 2012.<sup>2</sup> In her declaration, Wilkens asserts that, during her 2012  
2 interview for reappointment, Defendant Smith expressed dissatisfaction with her vote to  
3 reduce the sentence of Flibotte, a 74-year-old first-time offender who had been sentenced to  
4 prison for ninety years for possession of child pornography. (Doc. 1, Ex. G.) According to  
5 Wilkens, Defendant Smith became “agitated” and told her in a raised voice that she had  
6 “voted to let a ‘sex offender’ go.” (*Id.*) Wilkens concludes that she was not reappointed  
7 because “the Governor’s office does not want to receive clemency recommendations from  
8 Board members in high-profile cases.” (*Id.*)

9       Melvin Thomas was appointed to the Board in April 2012 and resigned on August 5,  
10 2013. Thomas asserts in his declaration that he was aware that “the three Board members  
11 who left before me were forced out because each one of them had recommended clemency  
12 in one or more cases that got sent up to Governor Brewer.” (Doc. 1 at H.) He claims that  
13 he once saw a letter from the Governor’s office to an unnamed Board member relaying the  
14 Governor’s displeasure about a Board vote. (*Id.*) Thomas further claims that Jesse  
15 Hernandez, who replaced Belcher as Board Chairman in April 2012, informed Board  
16 members on more than one occasion that Governor Brewer either had been unhappy with a  
17 vote or would be unhappy if the Board voted a certain way in an upcoming case, and that  
18 Hernandez got this information from the Governor’s office. Nonetheless, Thomas asserts  
19 that all of his votes while serving on the Board were dictated by his conscience and that he  
20 was unconcerned about losing his job as a result of how he voted. (*Id.*)

21       Jesse Hernandez served as Board Chairman from April 2012 until his resignation on  
22 August 16, 2013. In his declaration, Hernandez claims that he learned shortly after taking  
23 office that the Board “is not independent from the Governor.” (Doc. 1, Ex. I.) “Not long  
24 after I was sworn in, I was called to the first of several ‘come to Jesus’ meetings with Scott  
25 Smith and other individuals representing Governor Brewer.” (*Id.*) According to Hernandez,  
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27       <sup>2</sup> Wilkens testified that she was appointed to the Board in 2010 to fill the remainder  
28 of an existing term for which she then sought reappointment in 2012.

1 he was lectured about the Governor's policy to be tough on crime and was told, "We don't  
2 want another Macumber or Flibotte." (*Id.*) Hernandez understood this to mean that he was  
3 expected to vote against clemency in "particular kinds of cases." (*Id.*) He further asserts that  
4 during his short time on the Board, "the other members understood clearly that they risked  
5 losing their jobs if they voted contrary to the Governor's wishes" and that current Board  
6 member Ellen Kirschbaum said, "What would the Governor think?" in response to  
7 Hernandez's remark that she was "always a no" vote. (*Id.*) Finally, Hernandez claims that  
8 after Schad received a stay of execution in early 2012, Hernandez overheard Kirschbaum,  
9 Melvin Thomas, and (current Board chairman) Brian Livingston discuss Schad's case in the  
10 break room and that "all agreed that they would not be voting for clemency in his case." (*Id.*)  
11 According to Hernandez, Kirschbaum "said something similar to what she had told me  
12 before: 'I could not put my name on that. What would the Governor think?'" (*Id.*)

13 In addition to these declarations from former Board members, Schad also attached two  
14 letters from current Board members written in response to Schad's counsel's September 23  
15 letter requesting recusal. In the first letter, John LaSota writes that he will not recuse himself  
16 and denies as untrue the allegation that he has ever received a letter from the Governor's  
17 office expressing displeasure with votes in favor of clemency. (Doc. 1, Ex. B.) He also  
18 denies ever having been "summoned" to a meeting with any member of the Governor's staff  
19 for such person to express displeasure with a Board vote. (*Id.*) And in the second letter,  
20 Ellen Kirschbaum also declines to recuse herself and states that she "has no personal bias or  
21 prejudice against Mr. Schad" and that her "decisions are based on a comprehensive review  
22 of materials presented to me as well as all the information presented at hearings." (Doc. 6,  
23 Ex. J.)

24 In response to Schad's motion for injunctive relief, Defendants proffered written  
25 declarations from Defendant Board members Kirschbaum, LaSota, and Livingston stating  
26 that they have not been told how to vote, that job security is not a consideration in their vote,  
27 that they exercise independence in voting, and that they have not discussed Schad's case or  
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1 how they intend to vote. (Doc. 9, Exs. C, D, E.) Defendants also proffered a declaration  
2 from former Board member Thomas, who, along with Livingston and Kirschbaum, deny that  
3 they ever discussed Schad's case in the Board's breakroom or elsewhere. (Doc. 9, Ex. B, C,  
4 E.) Further, Defendants have proffered a redacted state investigative report substantiating  
5 nine allegations of inappropriate and unprofessional acts by former Board Chairman  
6 Hernandez. (Doc. 9, Ex. A.)

7 At approximately 3:30 p.m. on Friday, September 27, Schad filed a motion for a  
8 temporary restraining order and/or preliminary injunction seeking to enjoin the Board from  
9 meeting on October 2. Jones thereafter intervened and joined the motion. Jones' complaint  
10 contains slightly different claims for relief but the joint request for emergency injunctive  
11 relief was premised solely on one claim shared by Schad and Jones: that Defendants had  
12 "created a clemency process that is arbitrary, capricious and effectively denies access to  
13 executive clemency for high profile Arizona inmates." (Doc. 1 at 18.) On October 1, the  
14 Court held an evidentiary hearing on this claim.

15 At the evidentiary hearing, Plaintiffs called as witnesses former Board members  
16 Belcher, Stenson, Wilkens, and Thomas. With the exception of a clarification from Thomas  
17 concerning a "letter" explained below, each confirmed that their declarations were true and  
18 accurate. In other words, the former Board members confirmed their belief that their prior  
19 votes regarding clemency were a major driving force in the decision by Governor Brewer not  
20 to reappoint them to the Board. The Court sees no reason to question this testimony and  
21 agrees that Governor Brewer's failure to reappoint certain Board members was driven, at  
22 least in part, by dissatisfaction with those members' past votes.

23 The testimony from Thomas regarding a "letter" he was shown resulted in  
24 considerable confusion. During the hearing, Thomas testified that someone showed him a  
25 portion of a letter on a cell phone or tablet, that he saw only a few sentences and did not  
26 know to whom the letter was addressed or from whom the letter was sent, and that the person  
27 who showed him the letter "implied" that it was from the Governor or her staff and that the  
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1 letter expressed displeasure with certain Board members for voting in favor of clemency in  
 2 a particular case. On October 3, 2013, Thomas clarified that the “letter” at issue was the  
 3 letter the Board had sent to the Governor regarding Flibotte. Schad chose not to call Board  
 4 Chairman Hernandez or Defendant Scott Smith as witnesses.

5 Defendants called as witnesses Defendant Board members Livingston, Kirschbaum,  
 6 and LaSota. Each reaffirmed the statements in their declarations and denied having ever  
 7 been contacted by the Governor or her staff expressing displeasure concerning a Board vote  
 8 or having ever been threatened to vote a certain way. Each also testified that they vote  
 9 independently and that none had prejudged Plaintiffs’ clemency applications. This testimony  
 10 by Livingston, Kirschbaum, and LaSota was credible. In summary, Plaintiffs did not  
 11 establish: 1) the current Board members have been contacted by the Governor or her staff to  
 12 express displeasure regarding a past vote; 2) the current Board members have been contacted  
 13 by the Governor or her staff regarding future votes; nor 3) the current Board members have  
 14 prejudged any matter.

## 15 DISCUSSION

### 16 I. Standard for Temporary Restraining Order

17 A temporary restraining order is “an extraordinary and drastic remedy, one that should  
 18 not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”  
 19 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). The Ninth  
 20 Circuit has adopted two tests a district court must use when deciding whether to grant a  
 21 temporary restraining order.<sup>3</sup> *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,  
 22 1135 (9th Cir. 2011) (finding District Court “made an error of law” by employing only one  
 23 test when denying preliminary injunction). First, a plaintiff seeking a temporary restraining  
 24 order can attempt to satisfy the four-part test adopted by the Supreme Court in *Winter v.*

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 27 <sup>3</sup> A request for a temporary restraining order is analyzed under the same standards as  
 28 a request for a preliminary injunction. *See Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush  
 and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).



1 *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under that test, a plaintiff  
2 “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable  
3 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and  
4 that an injunction is in the public interest.” *Id.* at 20. If a plaintiff cannot meet the *Winter*  
5 test, he may show there are “serious questions going to the merits,” the balance of hardships  
6 tip sharply in his favor, there is a likelihood of irreparable injury, and the injunction is in the  
7 public interest. *Cottrell*, 632 F.3d at 1135. This latter “sliding scale approach” allows a  
8 plaintiff to make a lesser showing of likelihood of success provided he will suffer substantial  
9 harm in the absence of relief. *Id.* at 1133.

10 In the context of a capital case, the Supreme Court has emphasized that these  
11 principles apply when a condemned prisoner asks a federal court to enjoin his impending  
12 execution because “[f]iling an action that can proceed under § 1983 does not entitle the  
13 complainant to an order staying an execution as a matter of course.” *Hill v. McDonough*, 547  
14 U.S. 573, 583-84 (2006). Rather, “a stay of execution is an equitable remedy” and “equity  
15 must be sensitive to the State’s strong interest in enforcing its criminal judgments without  
16 undue interference from the federal courts.” *Id.* at 584.

## 17 **II. Likelihood of Success on the Merits or Questions Going to the Merits**

18 Plaintiffs’ motion for temporary injunctive relief centers on a claimed right to a “fair  
19 and impartial [clemency] tribunal” and the allegation that the current members of the Board  
20 are impermissibly motivated by personal and political interests against voting for clemency  
21 because they fear both job loss and displeasing the Governor. (Doc. 6 at 10-13.) Plaintiffs  
22 have not offered sufficient evidence to support their claims.

23 In Arizona, the Governor has the power to grant reprieves, commutations, and pardons  
24 for all offenses except treason and impeachment. Ariz. Const. art. 5, § 5. This power is  
25 limited by the Board in that “[n]o reprieve, commutation or pardon may be granted by the  
26 governor unless it has first been recommended by the board.” A.R.S. § 31-402(A). The  
27 Board consists of five members who are appointed by the Governor for five-year terms and  
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1 who may be removed by the Governor only for cause. A.R.S. § 31-401(A), (D), (E).

2 Capital prisoners have no constitutional right to clemency proceedings, *Herrera v.*  
3 *Collins*, 506 U.S. 390, 414 (1993), or to commutation of a sentence. *Ohio Adult Parole Auth.*  
4 *v. Woodard*, 523 U.S. 272, 280 (1998) (plurality opinion); *Connecticut Bd. of Pardons v.*  
5 *Dumschat*, 452 U.S. 458, 464 (1981). And pardon and commutation decisions are “rarely,  
6 if ever, appropriate subjects for judicial review.” *Dumschat*, 452 U.S. at 464. However, a  
7 divided Supreme Court has recognized that some procedural safeguards apply to clemency  
8 proceedings. In *Woodard*, the Court addressed a procedural due process claim involving  
9 Ohio’s clemency process. 523 U.S. at 272. Although four justices concluded that the Due  
10 Process Clause provides no constitutional safeguards as to clemency proceedings, a majority  
11 of the Court agreed that because death-sentenced prisoners retain some life interest until  
12 execution, “some *minimal* procedural safeguards apply to clemency proceedings.” *Id.* at 289  
13 (O’Connor, J., concurring). “Judicial intervention might, for example, be warranted in the  
14 face of a scheme whereby a state official flipped a coin to determine whether to grant  
15 clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency  
16 process.” *Id.*; see also *Woratzek v. Arizona Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th  
17 Cir. 1997) (concluding that a procedural due process violation exists only if the clemency  
18 board’s procedures “shock the conscience”). Justice Stevens opined that the Due Process  
19 Clause protects against the use of procedures “infected by bribery, personal or political  
20 animosity, or the deliberate fabrication of false evidence.” 523 U.S. at 290-91 (Stevens, J.  
21 concurring in part and dissenting in part). He further opined that the Equal Protection Clause  
22 protects against the use of “race, religion, or political affiliation as a standard for granting or  
23 denying clemency.” *Id.* at 292.

24 Since *Woodard*, courts have adopted a cautious approach in determining whether the  
25 “minimal procedural safeguards” applicable to clemency under *Woodard* require that a  
26 decision maker be free of bias. For example, in *Anderson v. Davis*, a capital prisoner sought  
27 to remove the Governor of California from the clemency process by asserting that Governor  
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1 Gray Davis had an alleged “blanket policy vis à vis murderers to deny all applications of  
2 executive clemency out-of-hand without exercising any judgment on the particular case or  
3 prisoner before him.” 279 F.3d 674, 675 (9th Cir. 2002). The Ninth Court denied the  
4 prisoner’s request for injunctive relief and a stay of execution after noting that other courts  
5 “have uniformly rejected allegations that due process is violated by a governor who adopts  
6 a general policy of not granting clemency in capital cases.” *Id.* at 676. The court further  
7 observed that the prisoner had failed to present any evidence suggesting that Governor Davis  
8 was incapable of “judging a particular controversy fairly on the basis of its own  
9 circumstances,” but also clarified that it was not holding that the standards applicable to  
10 decisions of judicial officers and administrative boards apply to clemency decisions. *Id.* at  
11 676-77 & n.1.

12 Similarly, in *Parker v. State Bd. of Pardons and Paroles*, a capital prisoner  
13 unsuccessfully sought injunctive relief and a stay of execution based on alleged bias of the  
14 board, including that of its chairman, who several years prior allegedly stated: “No one on  
15 death row [will] ever get clemency as long as [I am] Chairman of the Board.” 275 F.3d  
16 1032, 1034 (11th Cir. 2001) (per curiam) (alteration in original). The Eleventh Circuit  
17 affirmed the district court’s crediting of the chairman’s testimony at a hearing that he now  
18 “has an open mind and listens to all of the clemency cases that come before him prior to  
19 voting on them.” *Id.* at 1037. The court therefore declined to decide whether a “closed  
20 mind” would amount to a violation of due process. *Id.* at 1037 n.3.

21 In *Roll v. Carnahan*, two capital prisoners seeking to enjoin their executions argued  
22 that the Governor of Missouri could not be fair and impartial when considering clemency  
23 petitions because he was running for the United States Senate and the grant of clemency in  
24 capital cases was a campaign issue. 225 F.3d 1016, 1017 (8th Cir. 2000) (per curiam). The  
25 Eighth Circuit acknowledged the minimal due process required by *Woodard*, but rejected the  
26 challenge to the governor’s objectivity because “the decision to grant or deny clemency is  
27 left to the discretion of the governor.” *Id.* at 1018.

1 Finally, in *Bacon v. Lee*, the Supreme Court of North Carolina rejected the capital  
2 prisoners' argument that the minimal due process applicable to clemency proceedings  
3 "includes the right of an inmate seeking clemency to have his or her request reviewed by an  
4 executive possessing the level of impartiality normally required of a judge presiding over an  
5 adjudicatory proceeding." 549 S.E.2d 840, 849 (2001). There, the Governor of North  
6 Carolina had previously served as Attorney General for the state throughout part, or all, of  
7 the plaintiffs' appellate and post-conviction proceedings, and was the prosecutor in one of  
8 the cases. This, plaintiffs argued, precluded the governor from fairly considering their  
9 clemency requests and rendered him unqualified to sit as a neutral and impartial decision  
10 maker. In a lengthy opinion, the court concluded that *Woodard* did not intend "to disrupt the  
11 orderly role of the executive in discharging clemency power by making his or her  
12 background or previous life experiences a justiciable controversy" under the Due Process  
13 Clause, whether alleged on an "inherent conflict of interest" theory or an "actual bias"  
14 theory. *Id.* at 851. Instead, the court found that *Woodard* required only that state clemency  
15 procedures provide notice and an opportunity to participate in the proceedings, and that "the  
16 clemency decision, though substantively a discretionary one, is not reached by means of a  
17 procedure such as a coin toss." *Id.* at 710-11, 549 S.E.2d at 850.

18 Here, Plaintiffs' complaint rests primarily on two premises: (1) that they have a right  
19 to fair and impartial decision makers on the Board, and (2) that the Defendant Board  
20 members are in fact biased because of either personal animus or fear of retribution from the  
21 Governor or her staff. Plaintiffs cite no controlling authority for the first, and the evidence  
22 of the second is lacking.

23 Plaintiffs' motion for injunctive relief cites a plethora of cases concerning the  
24 requirement of a "fair and impartial tribunal" under the Due Process Clause. However, all  
25 involve judicial or administrative decision makers; none address clemency proceedings. This  
26 Court similarly found no cases extending the concept of a "fair and impartial tribunal" to  
27 clemency proceedings. Rather, as already noted, courts have either declined to decide the  
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1 issue or found that the minimal level of process due under *Woodard* does not include the  
2 same level of neutrality as required by the Due Process Clause in other administrative and  
3 judicial proceedings. *See, e.g., Bacon*, 549 S.E.2d at 853 (holding that “clemency  
4 determinations by the Executive Branch are fundamentally different than adjudicatory  
5 proceedings within the Judicial Branch” and therefore principles of recusal developed by and  
6 for judges are inapplicable). Indeed, the Ninth Circuit has expressly declined to hold that the  
7 standards applicable to decisions of judicial officers and administrative boards apply to  
8 clemency decisions. *Anderson*, 279 F.3d at 677 n.1.

9       The only other authority relied on by Plaintiffs is equally unavailing. In *Young v.*  
10 *Hayes*, the Eighth Circuit granted a stay of execution and reinstated a capital prisoner’s  
11 § 1983 complaint alleging a violation of his right to due process in clemency. 218 F.3d 850  
12 (8th Cir. 2000). There, a supervising prosecutor had threatened to fire an employee attorney  
13 who wanted to provide information to the Governor of Missouri in support of the prisoner’s  
14 clemency application. The court found that Missouri law permitted the consideration of  
15 evidence in support of clemency from any and all sources and that the defendant supervisor  
16 had “deliberately interfered with the efforts of petitioner to present evidence to the  
17 Governor.” *Id.* at 853. Unlike in *Young*, where the government official threatened a witness  
18 and thereby impeded the prisoner’s ability to make a case for clemency, Plaintiffs here do  
19 not contend that Defendants have deliberately interfered with their efforts to present evidence  
20 in connection with their clemency applications. Rather, Plaintiffs believe that staff working  
21 for the Governor, who has the ultimate decision to grant or deny clemency, have improperly  
22 pressured Board members to vote a certain way. The evidence, however, is to the contrary.  
23 The Board members stated under oath that they have not been pressured by the Governor to  
24 vote a certain way.

25       Assuming that the minimal due process applicable to clemency proceedings pursuant  
26 to *Woodard* includes access to an impartial decision maker, Plaintiffs have not demonstrated  
27 that they lack access to a fair and impartial clemency process. Defendant Board members  
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1 Livingston, Kirschbaum, and LaSota testified at the hearing that each votes independently,  
2 that each considers only the evidence and arguments of counsel in determining how to vote,  
3 that none have had contact with the Governor's office or any kind of communication from  
4 the Governor or her staff regarding how to vote in Plaintiffs' cases, and that none had yet  
5 determined how to vote on Plaintiffs' applications. In addition, Livingston and Kirschbaum,  
6 as well as former Board member Thomas, denied having a conversation about Schad's case  
7 in the Board's breakroom or elsewhere and denied stating that they would be voting against  
8 Schad. In light of the credible and consistent testimony of Livingston, Kirschbaum, LaSota,  
9 and Thomas, the Court finds insufficient evidence that the current Board members are  
10 unwilling or incapable of being objective or maintaining an open mind when they consider  
11 clemency applications.

12 Similarly, Plaintiffs presented evidence that several former Board members believe  
13 they were not reappointed because the Governor was "unhappy" with their votes in favor of  
14 clemency. But again, even if their impressions were accurate, this does not demonstrate that  
15 the current Board members are incapable of objectivity or are biased. Livingston,  
16 Kirschbaum, and LaSota testified that job security is not a consideration in their vote, that  
17 they have received no communications from the Governor or her staff expressing displeasure  
18 with any of their clemency recommendations, that they have never been pressured to vote in  
19 a particular manner, and that each votes independently. As LaSota referenced during his  
20 testimony, Arizona law provides for dismissal of a Board member only for "cause." A.R.S.  
21 § 31-401(E). Given this standard, the Court finds no reasonable basis to conclude that "fear  
22 of dismissal" influences how the Board members vote or otherwise impacts exercise of their  
23 clemency-related duties. Nor does it find basis to conclude that fear of not being reappointed  
24 five years out means the Board members are incapable of "judging a particular controversy  
25 fairly on the basis of its own circumstances." *Anderson v. Davis*, 279 F.3d 674, 675 (9th Cir.  
26 2002). In short, on the only claim argued in their request for injunctive relief, Plaintiffs have  
27 not established they are likely to succeed or that there are serious questions going to the  
28

merits.<sup>4</sup>

### III. Remaining Factors

Having failed to establish a likelihood of success or serious questions going to the merits, the remaining factors cannot be dispositive. The Court notes, however, that there is a likelihood of irreparable harm in every § 1983 action brought by a capital prisoner seeking to enjoin an impending execution. *Towery v. Brewer*, 672 F.3d 650, 661 (2012). But the State also has a “strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. at 584. And “the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* Therefore, in addition to not satisfying the first requirement for obtaining injunctive relief, the remaining factors support the denial of injunctive relief.

Based on the foregoing,

**IT IS ORDERED** that Plaintiffs’ Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. 6) is **DENIED**.

DATED this 4<sup>th</sup> day of October, 2013.



Roslyn O. Silver  
Senior United States District Judge

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<sup>4</sup> The motion for preliminary injunctive relief does not address the likelihood of success on Claims Two and Three of Schad’s complaint.